

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No: 02-4304

UNITED STATES OF AMERICA,

Appellant

v.

EARNEST MILLER,

a/k/a

PAUL JONES

a/k/a

EARNEST RUSSELL

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Crim. No. 01 CR 00186)
District Judge: The Honorable Edwin M. Kosik

Submitted Under Third Circuit LAR 34.1(a)
After Remand from the United States Supreme Court

Before: FUENTES, SMITH and GIBSON, *Circuit Judges**

(Filed: May 16, 2005)

OPINION OF THE COURT

*The Honorable John R. Gibson, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

SMITH, *Circuit Judge*.

In an opinion filed on April 15, 2004, we agreed with the United States, the appellant in this criminal appeal, and concluded that there were “no facts in this record to support the District Court’s downward departure under U.S.S.G. § 4A1.3 or U.S.S.G. § 5K2.0.” Consistent with that determination, we vacated the judgment of the District Court sentencing Earnest Miller to 41 months imprisonment.

Miller filed a timely petition for writ of certiorari with the Supreme Court. After issuing its decision in *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005), the Supreme Court granted Miller’s petition for writ of certiorari, vacated our judgment, and remanded for further proceedings in light of *Booker*.

Thereafter, the Clerk of this Court directed the parties in a notice dated March 3, 2005, to comment on the applicability of *Booker*. Neither party responded. Thus, it appears that neither party seeks resentencing in accordance with *Booker*. For that reason, we will affirm the judgment of sentence.